SERVED: April 13, 2007

NTSB Order No. EA-5279

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of April, 2007

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. JOSHUA J. FLORES, Respondent.	Docket SE-17660

OPINION AND ORDER

Respondent has appealed from the written initial decision and order Administrative Law Judge William A. Pope, II, issued in this proceeding on December 8, 2006.[1] By that decision, the law judge denied respondent's appeal of the Administrator's emergency order revoking respondent's first-class medical

[1] A copy of the law judge's order is attached.

certificate.[2] We deny the appeal.

The Administrator's emergency revocation order, dated February 9, 2006, alleged that respondent was not qualified to hold an airman medical certificate based on 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2).[3] The Administrator's order, which also now serves as her complaint, alleged that respondent submitted to a United States Department of Transportation (DOT) pre-employment drug test on December 5, 2005, as part of the final interview process for a pilot position with Gulfstream International Airlines, Inc. The complaint also alleges that, on December 9, 2005, Laboratory Corporation of America Holdings reported that respondent's

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[2] Respondent waived the expedited procedural deadlines otherwise applicable to emergency revocation proceedings under 49 C.F.R. part 821, subpart I.

[3] Title 14 C.F.R. § 67.107 states, in relevant part, the following:
§ 67.107 Mental.
Mental standards for a first-class airman medical certificate are:
* * * * *
(b) No substance abuse within the preceding 2 years defined as:
* * * * *
(2) A verified positive drug test result acquired under an anti-drug program or internal program of the U.S. Department of Transportation or any other Administration within the U.S. Department of Transportation[.]

Sections 67.207(b)(2) and 67.307(b)(2) contain the same requirement for second- and third-class medical certificates, respectively.

primary drug test specimen result was positive for marijuana metabolites, and that the appropriate Medical Review Officer for Gulfstream International Airlines verified this result on December 14, 2005. The complaint also states that respondent exercised his right to have the "split drug test" specimen tested, and that, on December 21, 2005, Quest Diagnostics, Inc. reported that the split drug test specimen was also positive for marijuana metabolites. Compl. at ¶¶ 5-6. The parties stipulated to the accuracy of several of the allegations in the complaint, including the fact that respondent submitted a urine specimen for a drug test, which shows the presence of marijuana metabolites. Respondent did not stipulate to the fact that the urine tested was indeed respondent's urine.

Respondent appealed the Administrator's order, and the case proceeded to hearing before the law judge on May 25, 2006, and September 19, 2006.[4] At the hearing, the Administrator presented evidence regarding the urine specimen collection, chain of custody information, and the finding of marijuana metabolites in respondent's specimen. Respondent argued that the person administering the drug test and collecting the specimen did not comply with the applicable DOT regulations regarding the chain

[4] The law judge bifurcated the hearing to allow respondent additional time to contact witnesses. Tr. at 203-204.

of custody of the specimen, and regarding the exclusion of unauthorized persons from the collection site. The law judge did not find respondent's assertions regarding the invalidity of the collection site to be plausible, and affirmed the Administrator's emergency order of revocation.

On appeal, respondent essentially argues that the administration of the test and collection of the urine specimen, and subsequent chain of custody of the specimen, were contrary to DOT regulations regarding drug tests. As a result of these alleged shortcomings, respondent urges us to reverse the law judge's decision. The Administrator has filed a reply brief, asserting that respondent did not present an appropriate issue for appeal pursuant to 49 C.F.R. § 821.49(a).[5] The Administrator does not present any argument with regard to the facts of the case or the law judge's interpretation of the regulatory requirements for the administration of drug tests, but instead merely asserts a procedural argument that respondent did not present an appropriate issue for appeal, based on § 821.49(a).

With regard to the Administrator's procedural argument, we

[5] Title 49 C.F.R. § 821.49(a) provides that, with regard to appeals, the Board will consider only whether: (1) the findings of fact were each supported by a preponderance of reliable, probative, and substantial evidence; (2) the law judge made his conclusions in accordance with law, precedent, and policy; (3) the questions on appeal are substantial; and (4) any prejudicial errors occurred.

find that respondent does present an appropriate issue for appeal. We note that, although respondent had retained counsel to represent him at the hearing, he currently proceeds pro se. Respondent's appeal brief essentially asserts that the person administering the drug test, Ms. Kathy Zilba, did not maintain a valid chain of custody for his urine specimen, and that she did not secure the collection site to prevent the entry of unauthorized personnel at the site. Although respondent's brief does not fully articulate these arguments, respondent has cited the sections of the DOT regulations regarding testing sites that he argues Ms. Zilba violated. As such, we cannot agree with the Administrator that respondent has not presented an issue for appeal in accordance with § 821.49(a).

Although we have determined that respondent has presented an issue for appeal, we agree with the law judge that, based on the evidence in the record, respondent is not eligible to retain a medical certificate. The law judge's initial decision includes an extremely detailed synopsis of the procedure Ms. Zilba used in collecting the urine specimen at issue, and we decline to repeat those details here, as we have reviewed the transcript and evidence and affirm the accuracy of the law judge's synopsis. Respondent testified that Ms. Zilba left the drug testing collection site and did not keep the chain of

custody forms and stored specimens in a secure area. Tr. at 183, 190, 359, 381. Ms. Zilba's testimony, however, contradicts these assertions. Ms. Zilba indicated that respondent kept Ms. Zilba and his specimen in his view the entire time that Ms. Zilba transported the specimen across the hallway to an office, in which respondent completed the necessary forms regarding the chain of custody of the specimen. Tr. at 50, 68, 80. Ms. Zilba also noted that respondent signed a statement regarding the chain of custody of his specimen, which provided as follows:

> I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct.

Tr. at 56; Exhibit A-8.[6] Ms. Zilba also testified that she kept the specimens in a locked bag in the office, with the key to the bag around her neck, while she sequentially escorted the donors to the restroom. See Tr. at 155. Overall, the law judge correctly determined that the credibility of these witnesses was a key component in rendering a decision in this case, and then concluded that Ms. Zilba's testimony was more credible than respondent's testimony. Initial Decision at 16.

[6] Respondent identified the signature below this statement as his. Tr. at 396.

DOT drug testing regulations set forth comprehensive procedures to ensure the authenticity of specimen samples, and the accuracy of the results from drug tests on such samples. See 49 C.F.R. part 40; Exhibit A-7. In particular, these regulations require that the person collecting the specimens effectively restrict access to the collection materials and specimens and secure the facility against access during the procedure. 49 C.F.R. § 40.43(c). The regulations also instruct collectors as follows: "(2) To the greatest extent you can, keep an employee's collection container within view of both you and the employee between the time the employee has urinated and the specimen is sealed." Id. § 40.43(d)(2). In addition, the regulations require collectors to, "implement a policy and procedures to prevent unauthorized personnel from entering any part of the site in which urine specimens are collected or stored." Id. § 40.43(e).

While the DOT regulations regarding drug-testing procedures set forth extremely specific requirements that are designed to ensure the accuracy of drug test results, we have previously recognized that a de minimus procedural violation may not automatically render a drug test result invalid. In Commandant v. Raymond, NTSB Order No. EM-175 (1994), we affirmed the Coast

Guard Commandant's[7] conclusion that the results of a drug test were valid, "notwithstanding several departures from the literal requirements of the [DOT] regulations on proper specimen collection and handling procedures." Id. at 2. We also rejected the argument that any deviation from DOT drug testing requirements must render the drug test invalid. Id. at 2 n.3; see also Commandant v. Sweeney, NTSB Order No. EM-176 at 5 (1994) (stating that, "we are unconvinced that there can be no de minimus or irrelevant breaches of the [drug-testing] guidelines or the regulations based on them"). In addition, we have previously suggested that respondents who seek to invalidate the results of a drug test after the Administrator has presented a prima facie case on the authenticity of the specimen and accuracy of the test should produce evidence, "circumstantial or otherwise, which would support a finding that the integrity of [the] specimen [was] compromised." Administrator v. Corrigan, NTSB Order No. EA-4806 at 6 (1999) (noting that the collector's "essential adherence" to DOT drug testing regulations sufficiently established that respondent must have adulterated her specimen).

[7] We note that the DOT drug testing requirements at 49 C.F.R. part 40 also apply to the Coast Guard; therefore, our citation to previous decisions we have issued in response to appeals of Coast Guard Commandant decisions with regard to these DOT regulations is not inappropriate.

In the case at hand, the law judge found, and we agree, that Ms. Zilba essentially adhered to the applicable DOT regulations regarding drug testing. Ms. Zilba stood in a vestibule immediately outside the door of the restroom in which respondent provided the specimen, to prevent anyone from entering the restroom. According to her testimony, Ms. Zilba then kept the collection container with the specimen in view of both herself and respondent, while both she and respondent washed their hands in a separate room and proceeded to an office, in which they completed the chain of custody forms. Ms. Zilba also testified that she poured the specimen into two vials and sealed the vials in respondent's presence; the evidence in the record also indicates that respondent initialed the seals on these vials. After packing the two sealed vials for shipment to the laboratory, Ms. Zilba sealed the package with tamper-evident labels in respondent's presence, and respondent initialed the labels, in accordance with Ms. Zilba's instructions. In summary, Ms. Zilba essentially complied with 49 C.F.R. part 40.

Furthermore, respondent has not produced any evidence or even asserted any notion that someone compromised the integrity of his specimen. As the law judge noted, any period of time in which respondent's urine and Ms. Zilba were out of his sight was

too brief for Ms. Zilba to switch or adulterate respondent's specimen in some manner. Initial Decision at 17. In addition, respondent did not argue that either Ms. Zilba or any other person had a motive to tamper with the specimen, and the record offers no evidence of such a theory or motive.

Overall, we agree with the law judge's conclusion that the Administrator has proven by a preponderance of the evidence that respondent does not meet the eligibility requirements for a medical certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The order of the law judge, denying respondent's appeal and upholding the Administrator's emergency revocation of respondent's medical certificate, is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.